IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

WEDNESDAY, THE 27TH JUNE 2007 / 6TH ASHADHA 1929

MACA.No. 1087 of 2004()

OP(MV.)193/2000 of MOTOR ACCIDENT CLAIMS TRIBUNAL, MUVATTUPUZHA DT.24.3.2004
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APPELLANT/RESPONDENT IN O.P.M.V.

THE BRANCH MANAGER, NATIONAL INSURANCE COMPANY LTD., KOLENCHERRY, REP. BY THE ASSISTANT MANAGER, THIRD PARTY CLAIMS CELL, NATIONAL INSURANCE CO.LTD., AJAY VIHAR, M.G.ROAD, ERNAKULAM

BY ADV. SRI.M.A.GEORGE

RESPONDENTS: PETITIONER IN O.P.M.V.
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1. **JENNY MANOJ, W/O.LATE MANOJ AGED 28 YEARS, MALAYIL HOUSE, PERUNGALAM P.O. KOLLAM.**

2. **VIJAYAN DAVID, AGED 58 YEARS, NO./15, 16TH CROSS, LAKSHMIPURAM, ULSOOR, BANGALORE - 8.**

3. **MILAN GEEVARGHESE MATHEW,(MINOR) S/O.LATE MANOJ, REP. BY HIS MOTHER AND LEGAL GUARDIAN JENNY MANOJ DO. DO.**

4. **ZACHARIA, S/O.P.A.MUHAMMED, PANATTIL HOUSE, ELAMBRA, NELLIKUZHI, KOTHAMANGALAM.**

5. **SAVAD, S/O.KOCHUPILLAI, MADAVANAKUDY HOUSE, ADIVADU KARA, POTHANICADU VILLAGE.**

BY ADV. SRI.S.NIRMAL KUMAR

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD ON 27/06/2007, ALONG WITH MACA .NO.1055/2007 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

J.B. KOSHY and K.P.BALACHANDRAN, JJ.

M.A.C.A. Nos. 1087/2004
and 1055/2007

Dated this the 27th day of June, 2007

Judgment

Koshy, J.

Award in M.V. (O.P.) No.193 of 2000 on the file of the Motor Accidents Claims Tribunal, Muvattupuzha is challenged by the insurance company as well as by the claimants. One Manoj while riding a motor cycle bearing registration No.KL/7W 7923 along the Aluva - Munnar road, a bus bearing registration No.KL/7K 8753 driven by the second respondent came from the opposite direction and hit against the motor cycle. The rider as well as the pillion rider sustained injuries and Manoj succumbed to the injuries. The tribunal found that the accident occurred due to the negligence of the deceased and, therefore, his claimants are not entitled to compensation under section 166 of the Motor Vehicles Act. Thereafter, the tribunal suo motu converted the application under section 163-A. since negligence is not an ingredient to deny compensation under section 163-A, compensation was calculated as per second schedule and ordered the

insurance company to pay a sum of Rs.4,46,500/- with interest at 9%. Contention of the appellant insurance company is that when motor accident claim under section 166 is filed, the tribunal has no jurisdiction to convert the application suo motu into an application under section 163-A. Claimants did not file even an amendment application during the pendency of the case to convert the application under section 166 into an application filed under section 163-A. When an application is filed under section 166 and tried on the above contention, tribunal cannot pass an award under section 163-A. We are of the view that the above contention is right. Application under section 166 and 163-A are mutually exclusive and without any application, the tribunal cannot convert the application filed under section 166 into an application under section 163-A even though eagerness of the tribunal to help the poor dependents of the motor accident victim is understandable. In the above circumstances, appeal filed by the insurance company, namely, M.A.C.A. No.1087 of 2004 is allowable.

2. M.A.C.A.No.1055 of 2007 was filed by the dependents of the motor accident victim questioning the finding of negligence as well as the quantum of

compensation assessed. Pillion rider of the motor cycle driven by Shri Manoj deposed that the bus came from the opposite direction collided with the motor cycle and after the collision the motor cycle was thrown to the right side of the road and he sustained injuries. He was removed to the hospital by the driver and other employees of the bus and the bus stopped at the spot of the accident.

3. PW3 is an occurrence witness. His deposition was summarised by the tribunal as follows:

> "The accident occurred in Aluva-Mu8nnar road in front of his house. The road lies in east west direction. The motor cycle was proceeding towards east along the northern side of the road. The bus hit on the motor cycle. The collision occurred on the northern side of the road. There were two passengers on the motor bike. They were removed to the hospital in an autorickshaw. The accident occurred due to the negligence of the driver of the bus etc. PW3 said that police came to the scene of occurrence within one hour of the accident and that he has given statement to the police."

The wife of Manoj, first claimant, deposed that Manoj was riding on a motor cycle with her brother on the pillion

seat. She was travelling on the pillion seat of another motor cycle driven by the brother of Manoj. Another motor cycle was going in front of the bikes. That motor cycle was driven by Nigil, a friend of her brother Anil. They were travelling from west towards east. The bus came from east and collided with the motor cycle driven by Manoj. The bike toppled down to the southern side and the passengers on the vehicle also fell down and the bus was stopped. She also stated that the accident occurred at the right side of the road. The vehicle was thrown to the right side as an impact of a big vehicle hitting a small vehicle. Ext.A1 is the certified copy of FIR. It is stated therein that bus No.KL-7/K 8753 was driven along Aluva-Munnar road from east towards west in a rash and negligent manner and hit against the motor cycle that came from the opposite direction and caused the death of the rider on the motor cycle and injuries to the pillion rider thereon. The FIR was registered on the basis of the statement given by Nigil, who was a friend of the deceased. In the statement given by Nigil, he has stated that he was proceeding ahead of the motor cycle driven by Manoj, that after proceeding to some distance he could not see the other motor vehicles

accompanying him and that when he came back, he saw Manoj and others had sustained injuries in the accident so that it is evident that Nigil had no direct knowledge regarding the occurrence of the accident. After investigation, the investigating officers came to the opinion that bus driver was negligent and hence Ext.A2 charge sheet was filed. Second respondent bus driver was implicated for having committed the offence punishable under sections, 279, 337, 338 and 304 (A) of the Indian Penal Code. Ext.A3 is the scene mahazar.

4. PW3 is an attestor to the scene mahazar to show that he is an actual eye witness. Merely because in the scene mahazar the bus as well as the motor cycle was in the right side, it cannot be stated that the accident occurred at that spot. As stated by PWs 2 and 3, immediately on the accident, the vehicle was thrown out on the right side. Evidence of PW3 was disbelieved by the tribunal. Merely because PW1, in a perplexed mind, at one sentence stated that the accident occurred at the right side of the road, it cannot be concluded that the bus driver was not negligent. Evidence of PW3 withstood the cross-examination and no counter evidence was adduced and that shows that the bus driver was negligent, but, it

cannot be stated that motor cyclist was very careful. The accident occurred in the highway due to head-on collision. It is true that police charge-sheeted the bus driver after due investigation. But, sole responsibility cannot be bestowed on the bus driver. Totality of evidence would suggest that the accident occurred due to composite negligence of both drivers and, therefore, contributory negligence on the part of the deceased is only 50%. In the above circumstances, liability of the owner, driver and insurance company of the bus is only 50% of the compensation awarded. Therefore, we fix the contributory negligence on the part of the deceased as 50%.

5. Then, the question is what is the compensation payable if compensation is calculated under section 166 of the Motor Vehicles Act. The deceased was a service engineer in Amies Communications, Kochi. He was having diploma in Electronics and Telecommunications. Ext.A8 is the salary certificate issued by the firm showing that his salary at the time of accident was Rs.3,500/-. Manoj has obtained diploma from Karnataka University. Even though salary certificate was not accepted by the tribunal, the tribunal held that

considering his educational qualification and considering the fact that he was married and maintaining a family, the income can be assessed at Rs.3,000/- on a rough estimate. Future prospects also has to be taken into account. Shri Manoj died at the prime age of his life. Even though it was contended by the counsel for the claimants that Rs.3,000/- assessed is very meagre. Since he was drawing Rs.3,500/- as salary at the time of his death and taking future prospects, at least Rs.3,500/- should be taken as the monthly income. However, in the absence of data, we see no ground to change the monthly income assessed by the tribunal, that is, Rs.3,000/- per month. After deducting Rs.1,000/-, Rs.2000/- was taken as the monthly loss of dependency. He left behind a minor child and wife aged 28 apart from his father.

6. Then, the question is what is the multiplier to be used. The tribunal has taken 18 as the multiplier. It was argued by the counsel for the claimant that considering the life expectancy of the people now, a higher multiplier ought to have been taken. A three member bench of the Supreme Court in Smt.Supe Dei and others v. M/s.National Insurance Company Ltd.and another (JT 2002 (Suppl.1) SC 451), held that the second

schedule of the Motor Vehicles Act is framed for the purpose of awarding compensation under section 163-A, but, it serves as a guideline for determination of compensation under section 166 of the Motor Vehicles Act. Since the victim of the accident in that case was aged 32, considering the second schedule, Hon'ble Supreme Court accepted 17 as the multiplier. In United India Insurance Co. Ltd. v. Patricia Jean Mahajan and others (JT 2002 (5) SC 74), the Apex Court held that, except in very rare cases, multiplier system should not be deviated from. The other methods, which were in vogue prior to the introduction of the multiplier system, were held to be no more good system. It was further held that normally the multiplier, as indicated in the second schedule, should be applied. Though the second schedule is found to be a safe guide for the purpose of calculation of the amount of compensation, in special circumstances, it can be varied. In that case, it was also held that if the multiplicand is very high, a lesser multiplier can be taken. In Abati Bezbaruah v. Dy. Director General, Geological Survey of India and another ((2003) 3 SCC 148), it was held that structured formula mentioned in the second schedule gives guidelines for

determination of the amount of compensation in terms of section 166 of the Motor Vehicles Act. Deviation from the structured formula can be resorted to only in exceptional cases and ordinarily the above multiplier system should be followed. In the above circumstances, taking guidance from second schedule, we see no ground to change the multiplier of 18 adopted by the tribunal.

7. Compensation payable for loss of dependency can be calculated as Rs.2,000 x 12 x 18 = Rs.4,32,000/-. The tribunal has awarded Rs.2,000/- for funeral expenses and Rs.5,000/- pain and suffering and Rs.2,500/- towards loss of estate. We see no ground to change the same. Wife was aged only 28 at the time of accident. In the above circumstances, we grant Rs.10,000/- as loss of consortium. The child was too young. He lost love and affection and fatherly care. For loss of love and affection, we award another Rs.5,000/-. Thus, total compensation determined is Rs.4,56,500/-. We have already held that there is contributory negligence on the part of the appellant. Therefore, only 50% amount is payable to the dependents. Therefore, compensation payable to the dependents will be Rs.2,28,250/-. The above amount should be deposited by the third respondent insurance

company in M.A.C.A.No.1055 of 2007 with 9% interest from the date of application till its deposit after deducting the amount already paid.

As held by the tribunal father of the deceased, that is, second claimant before the tribunal is entitled to get Rs.50,000/-. First petitioner widow is entitled to one-third of the balance amount. She is allowed to withdraw the same as she has to maintain the child. Balance amount should be deposited in the name of the minor child (second appellant in M.A.C.A.No.1055 of 2007) in fixed deposit in a nationlaised bank and that can be withdrawn when the child attains majority.

Both appeals are disposed of accordingly.

J.B.KOSHY
JUDGE

K.P.BALACHANDRAN
JUDGE

vaa

J.B. KOSHY AND
K.P.BALACHANDRAN, JJ.

M.A.C.A.Nos.1087/2004 &
1055/2007

JUDGMENT

Dated:27th June, 2007